

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

February 24, 2009

The Rhode Island Ethics Commission held its 3rd meeting of 2009 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, February 24, 2009, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair James V. Murray

Ross Cheit, Vice Chair Deborah M. Cerullo SSND

Richard E. Kirby*

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross and Peter J. Mancini.

At 9:05 a.m., the Chair opened the meeting. The first order of business was a Legislative Update. Staff Attorney Gramitt informed that Representative McNamara submitted House Bill 5378, which

would greatly expand the Code's revolving door prohibitions for executive branch employees. He indicated that the bill as drafted would prevent any such employee from accepting any other employment with the state, any quasi-public agency, or any state subsidized corporation or entity until a new governor is elected. He stated that it would even seem to prevent an executive branch employee from transferring to another state department. Staff Attorney Gramitt advised that he spoke with the sponsor, who wanted to know if the Commission would favor legislation like President Obama's executive order prohibiting administration officials from leaving and lobbying the executive branch while he remains in office. Commissioner Cheit commented that the legislation as drafted seems too broad.

***Commissioner Kirby arrived at 9:13 a.m.**

The next order of business was a motion to approve the minutes of the Open Session held on February 10, 2009. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve the minutes of the Open Session held on February 10, 2009.

ABSTENTIONS: Deborah M. Cerullo SSND and Richard E. Kirby.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Mary Eva Tudino, a staff attorney with the Rhode Island Family Court, Office of the Court Appointed Special Advocate. The Petitioner was present. Staff Attorney DeVault informed that this matter had been before the Commission on February 10th and that the Petitioner subsequently submitted a written memorandum which contains materially different representations. She stated that the Petitioner now represents that the memorandum of understanding would not be submitted to the Family Court, but rather that it would be absorbed into a property settlement agreement to be presented to the Family Court by the parties' attorneys. She further stated that the Petitioner now represents that her name would not be on the memorandum.

Staff Attorney DeVault informed that the Petitioner now states that she would not represent parties who have a child involved with CASA and that she would no longer mediate a case if the parties to whom she is providing services have a child who becomes involved with DCYF. The Petitioner stated that she concurs with the Staff recommendation. She reiterated that she would not represent clients or act as a witness, and she stated that her duties would be separate and apart from her duties as a guardian ad litem. She further

represented that she would not disclose confidences obtained in her job and she would perform conflict checks. In response to Commissioner Kirby, the Petitioner stated that CASA is under the direction of the judiciary. Commissioner Kirby voiced his concern with the Petitioner being on a list of referrals from the Family Court, particularly given that it is a small environment of attorneys who practice there. He indicated that some attorneys might think that they would be getting an edge by selecting her as the mediator. He inquired whether she could live without being on the list.

The Petitioner replied that she could live without being on the list, but she clarified that the parties, not the attorneys, select the mediator. Commissioner Kirby commented that it is a distinction without a difference. In response to Commissioner Cerullo, the Petitioner indicated that she could get referrals from mediators who are not attorneys. In further response, the Petitioner confirmed that the information she obtains in mediation is confidential. She stated that the parties would be told at the outset that she has a mandatory reporting requirement if there is any disclosure regarding abuse, neglect or a crime involving a child and that she would no longer be able to mediate. Commissioner Murray inquired if the certification the Petitioner obtained is specialized or general. The Petitioner stated that it is for divorce mediation. Commissioner Murray asked if Judge Jeremiah had approved of the Petitioner's plans. The Petitioner stated that he had signed her mediation certificate.

Commissioner Murray asked if Judge Jeremiah specifically knows of her intent to provide mediation services for parties in the Family Court. The Petitioner represented that Judge Jeremiah knows of her plan and has not objected. In further response, the Petitioner stated that she has not vetted the issue before Bar Counsel under the Code of Professional Responsibility. Commissioner Murray inquired whether the Petitioner could be subject to subpoena to disclose information. The Petitioner replied that she does not have a crystal ball but she would claim confidentiality under the statute. Commissioner Murray inquired about the limits of protection afforded under the statute, such as in a case of domestic abuse. He stated that he is troubled because he does not read the statute as providing a blanket prohibition against disclosure. In response to Commissioner Murray, the Petitioner represented that she has been a CASA attorney for fourteen years and prior to that had been a courtroom clerk in the Family Court.

In response to Commissioner Cheit, Commissioner Murray expressed that he finds it problematic for a Family Court employee to engage in such activity. Chair Binder asked if the same concerns would exist if the Petitioner were a witness with respect to domestic abuse involving a family member. Commissioner Murray replied that here the Petitioner is acting for remuneration. He stated that he has no problem with her doing it outside of the Family Court. The Petitioner reiterated that she would not be representing clients or acting as a witness, and that the statute protects confidentiality. Commissioner

Murray stated that it is just too close for him. Commissioner Kirby voiced his concern with the Petitioner being on the list as a Family Court employee. The Petitioner informed that attorneys on the list are also on the court appointed list and paid by the Family Court. She referred to page four of her memorandum and referenced a prior advisory opinion issued to the Exeter Town Planner.

Chair Binder noted that the Petitioner indicated that she does not need to be on the list. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Cheit to accept an amended Staff recommendation which states that the Petitioner would not be on the list, there was discussion. Commissioner Cerullo indicated that each of the issues is so close that she is not comfortable with it. She clarified that the motion is to approve the Staff recommendation, as amended. Upon the original motion, it was

VOTED: To adopt the draft opinion, as amended to state that the Petitioner would not be on the list.

AYES: Richard E. Kirby, Ross Cheit and Barbara R. Binder.

NOES: Deborah M. Cerullo SSND and James V. Murray.

The opinion did not issue due to a lack of five affirmative votes.

The next advisory opinion was that of Scott Wolf, a member of the

City of Providence Zoning Board of Review. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. The Petitioner stated that he requested the opinion to err on the side of caution. In response to Commissioner Kirby, he represented that, absent a potential rule of necessity situation, he would have recused. Chair Binder inquired if it would be difficult for the Petitioner to vote against the interest of his boss's employer. The Petitioner replied that he is strong-willed and noted that the subject board member is not part of the executive committee which determines his future at Grow Smart. In response to Commissioner Cerullo, the Petitioner stated that he could disagree with his boss's employer. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Kirby, there was discussion. Commissioner Kirby stated that he is comfortable voting on the opinion given that the Petitioner represented that board member is not an equity partner or on the executive committee of Grow Smart. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Scott Wolf, a member of the City of Providence Zoning Board of Review.

The next advisory opinion was that of Valerie Zuercher, a member of the Exeter-West Greenwich School Committee. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Chair Binder commented that while reviewing the draft opinion she began to rethink some past opinions

on this issue. She stated that the fact that it is the same representative is significant to her. She indicated that it is foreseeable that the representative could represent her in a grievance. She suggested that it might be time for a shift in policy. Commissioner Cerullo agreed and requested that this issue be added to the list of potential regulatory matters to address. In response to Chair Binder, Legal Counsel Conley advised that the Commission could shift its policy through the issuance of the advisory opinion.

Commissioner Cheit commented that he would rather have the Commission shift its policy in a more deliberative way. He noted that he is no more uncomfortable with this situation than any of the others on which the Commission has voted. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray to adopt the draft opinion, there was discussion. Commissioner Cerullo indicated that she would vote to approve the draft based upon the value of precedent. Commissioner Murray noted that he would approve the opinion with the proviso that the Commission look at this issue. Commissioner Cheit and Chair Binder agreed, with Chair Binder noting that the issue should be a priority along with the Complainant's role in the complaint process. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Valerie Zuercher, a member of the Exeter-West Greenwich School Committee.

The next advisory opinion was that of Laura A. Flanagan, a member of the Coventry Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. In response to Commissioner Cerullo, Staff Attorney DeVault indicated that, while she did not have a lengthy conversation with the Petitioner, she believes that the Petitioner understands the Staff's recommendations, which she indicated are pretty clear. Commissioner Cerullo expressed her concern regarding the Petitioner getting involved in informal conversations dealing with budgeting and what kind of opportunities there may be for such informal conversations. Chair Binder stated that if they started getting specific the Petitioner could not participate. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Laura A. Flanagan, a member of the Coventry Town Council.

At approximately 9:59 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Kirby, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

- a.) Motion to approve minutes of Executive Session held on February 10, 2009.**
- b.) In re: Frank Hyde,
Complaint No. 2008-5**
- c.) In re: Mark A. Baker,
Complaint No. NF2008-7**
- d.) In re: Donna J. Hayden,
Complaint No. NF2008-6**
- e.) Jason E. Ferrell v. Frank Caprio, Jr., et al.,
U.S. District Court C.A. No.08-378S**
- f.) Motion to return to Open Session.**

The next order of business was a motion to seal minutes of the Executive Session held on February 24, 2009. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To seal minutes of the Executive Session held on February 24, 2009.

Chair Binder reported that the Commission took the following actions

in Executive Session: 1) approved minutes of the Executive Session held on February 10, 2009; 2) approved an Informal Resolution & Settlement in the matter of In re: Frank Hyde, Complaint No. 2008-5; 3) approved an Informal Resolution & Settlement in the matter of In re: Mark A. Baker Complaint No. NF2008-7; 4) found that probable cause exists in the matter of In re: Donna J. Hayden, Complaint No. NF2008-6; and 5)

received a status update on Jason E. Ferrell v. Frank Caprio, Jr.

The next order of business was to finish the Legislative Update. Staff Attorney Gramitt advised that House Bill 5378 would need amendment before the Commission could decide whether or not it would oppose it. He informed that House Bill 5510 would prohibit legislators employed by a government employees' union from participating and voting on legislation regarding government employees' benefits or rights. He noted that the bill had been introduced last year and was met with concerns that it singled out union employees. Staff Attorney Gramitt indicated that he has been shown a copy of proposed legislation, which has not been filed, regarding the confidentiality of complaints filed during election season, beginning two months prior to any primary or general election. He noted that the Commission could not prevent the Complainant from making any disclosures. He also stated that, while the Commission would not want to see politically motivated complaints, there could be meritorious complaints filed during that period.

In response to Chair Binder, Staff Attorney Gramitt stated that the Staff has not looked into the number of additional complaints filed during the election season because there has been no discernable rise in complaints. In response to Commissioner Cerullo, Staff Attorney Gramitt advised that the proposed legislation has not yet been filed. He cautioned as to whether the legislature could or should tell the Commission that it cannot fulfill its duty to enforce the Code of Ethics. Commissioner Kirby noted that the Roney amendment provides for sanctions to keep political, unfounded complaints in check. He stated that the legislative committees would need to be enlightened regarding the Commission's statutes and regulations and the potential ramifications. Commissioner Cheit suggested that some data could be useful, particularly where there has been no significant rise in complaints in the September-October time frame. Chair Binder asked Staff Attorney Gramitt to monitor the potential legislation.

The next order of business was Discussion of the Complainant's role in the complaint process. Staff Attorney Gramitt presented the Commission with a memorandum which summarized the concerns raised. Commissioner Cheit recalled a past conversation with Phil West about the fact that Complainants previously had no idea what happened with the complaints they filed. Commissioner Cheit suggested that it might be possible to provide Complainants with notice to let them know how the process is proceeding, but not let

them into Executive Session. He indicated that the Commission should workshop the issue and consider the issues of notice and right to attend separately. Commissioner Cerullo suggested separating the issue of the right to attend and the right to receive a copy of the draft settlement. She indicated her belief that it would be valuable to know the final proposed resolution and to be present for the conversation, but she noted that there are problems with the Complainant receiving it beforehand. She expressed that it is important for the Complainant to be able to hear how the decision is made.

Commissioners Murray and Kirby voiced their concerns about the Complainant receiving a copy of the draft settlement proposal, and they recalled a prior case in which the proposed settlement appeared in the press a few days prior to the hearing. Commissioner Cerullo indicated that she would be in favor of providing oral information, not a written document. Chair Binder stated that it is important for the Complainant to receive notice of what is happening, but perhaps the settlement document should not be provided until the matter is resolved. Staff Attorney Gramitt stated that the Commission could ensure that the Complainant is notified that it would be considering a proposed settlement and send a copy of it to the Complainant if it is approved. Commissioner Cheit stated that it might be better to have three proposals for consideration, including where the Complainant receives notice, where the Complainant receives notice and the proposal, and where the Complainant is present for the hearing.

Staff Attorney Gramitt indicated that the proposals would be presented at the meeting after next.

The next order of business was the Director's Report. Executive Director Willever reported that there are two complaints and three advisory opinions pending. He informed that the Staff is in the process of interviewing applicants for the two vacant positions and he anticipates that the new hires will be in place before the financial disclosure season begins. He stated that the Education Program is extremely busy and noted that Staff Attorney Gramitt recently provided ethics training to groups of lobbyists. Director Willever advised that the Commission's present priorities are the Irons appeal and the Complainant's role in the complaint process. He thanked Commissioner Kirby for his many years of dedicated service to the Commission.

The next order of business was New Business. Chair Binder expressed that, now that there are two vacancies on the Commission, it is time to write to the Senate President and House Speaker regarding appointments. Commissioner Murray stated that he would favor the Commission sending correspondence from the Chair. Commissioner Murray requested that he would like a future status report on the number of outstanding fines and what efforts have been made regarding their collection. Commissioner Cheit suggested that the fines be posted on the website. Staff Attorney Leyden noted that the Division of Taxation posts unpaid fines on its website.

Commissioner Cheit commented that he has been concerned with quorum issues and vacancies, particularly with regard to when only five members are present and one member votes in the negative on an advisory opinion. He noted that if eight members were present an opinion would be approved even if three members voted in the negative. Commissioner Cheit advised that he has discussed the issue with Staff, including the fact that the Commission's quorum is defined by statute as a majority of the members, rather than of the sitting members. He suggested that if the Commission were ever to propose statutory changes to the Code, it should also include a change to define the quorum by the number of sitting members.

At approximately 11:25 a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary